TAN EWE HUAT

v.

PP

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
FAIZA TAMBY CHIK J
[CRIMINAL APPEAL NO: B-05-77-1995]
26 OCTOBER 2001

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in heroin - Section 37A - Admissibility of statements in evidence - Whether caution administered in proper form to accused - Whether meaning of inducement properly explained to accused - Whether statement made admissible*

EVIDENCE: *Statement - Cautioned statements admitted in evidence - Whether administered in proper form to accused - Whether meaning of inducement properly explained to accused - Whether admissible - Dangerous Drugs Act 1952, s. 37A*

This was an appeal by the accused/appellant against the High Court's decision convicting him on the charge of trafficking drugs. The High Court in convicting the appellant had principally relied on a cautioned statement made by the appellant to a recording officer. The appellant challenged the admissibility of the cautioned statement by alleging that the caution was not administered in its proper form and that the recording officer had not explained to the appellant what the word "inducement" meant. He also contended that if the cautioned statement was inadmissible then on the basis there was evidence showing that the heroin was found in his possession, while there was a presumption of possession by virtue of s. 37(d) of the Dangerous Drugs Act 1952 ('the Act'), there could not from this presumption be another presumption that he was trafficking in the drug. Hence, if the conviction of the appellant could not be sustained on the basis of the cautioned statement, the appellant could only be convicted for possession of the heroin.

Held:

Per KC Vohrah JCA

[1] There was no hint of compulsion in the caution administered to the appellant to give a statement and it was clear that the caution administered to him showed that he was not required to make a statement but that if he did, it would be used in evidence. It was not necessary to use the

prescribed words of the statutory caution; it would be sufficient if the words used had a similar effect on the accused. The trial judge had also made a valid finding of fact that the recording officer had properly explained the meaning of inducement to the appellant, and there was no suggestion by the appellant that he was in any way prevailed upon by someone in authority to make the cautioned statement. Hence, the cautioned statement was admissible. (pp 60 i - 61 a, d & e)

[2] The trial judge had decided, on the basis of the cautioned statement where the appellant had admitted that he was a drug trafficker and that the drug found was his, that he was guilty of the offence in the case. Therefore, the appellant was properly convicted on the basis of his admissions in the cautioned statement which had been properly admitted by the trial judge and which had been properly considered in the light of his defence and all the evidence of the case. (pp 62 c & h - 63 a)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah satu rayuan oleh tertuduh/perayu terhadap keputusan Mahkamah Tinggi yang mensabitkan beliau atas pertuduhan mengedar dadah. Mahkamah Tinggi dalam mensabitkan perayu telah secara utamanya bergantung pada pernyataan beramaran yang dibuat oleh perayu kepada seorang pegawai yang mencatat. Perayu telah mencabar kebolehterimaan pernyataan beramaran dengan mendakwa bahawa amaran tersebut telah tidak dilaksanakan menurut bentuknya yang sempurna dan bahawa pegawai yang mencatat telah tidak menerangkan kepada perayu apakah makna perkataan "inducement". Beliau juga menegaskan bahawa jika pernyataan beramaran tersebut tidak boleh diterima maka atas dasar terdapatnya keterangan yang menunjukkan bahawa dadah heroin tersebut telah didapati berada dalam milikan beliau, sementara terdapatnya anggapan pemilikan menurut s. 37(d) Akta Dadah Berbahaya 1952 ('Akta tersebut), tidak mungkin terdapat dari anggapan ini satu lagi anggapan bahawa beliau sedang mengedar dadah tersebut. Oleh itu, jika sabitan perayu tidak boleh dipertahankan atas dasar pernyataan beramaran tersebut, perayu hanya boleh disabitkan atas pemilikan dadah heroin tersebut.

Diputuskan:
Oleh KC Vohrah HMR

[1] Tidak terdapat tanda-tanda paksaan di dalam amaran yang dilaksanakan terhadap perayu untuk memberikan pernyataan dan ianya adalah jelas bahawa amaran yang dilaksanakan terhadap beliau menunjukkan bahawa beliau tidak dikehendaki untuk membuat satu pernyataan tetapi bahawa jika beliau berbuat sedemikian, ianya akan digunakan dalam keterangan. Adalah

tidak perlu untuk menggunakan perkataan-perkataan yang ditetapkan dari amaran berkanun; ianya memadai jika perkataan-perkataan yang digunakan mempunyai kesan yang sama ke atas tertuduh. Hakim perbicaraan tersebut telah juga membuat satu keputusan fakta yang sah bahawa pegawai yang mencatat telah menerangkan dengan sempurnanya maksud perkataan "inducement" kepada perayu, dan tidak terdapat saranan oleh perayu bahawa beliau telah dalam apa cara pun didesak oleh seseorang yang mempunyai kuasa untuk membuat pernyataan beramaran tersebut. Oleh itu, pernyataan beramaran tersebut boleh diterima.

[2] Hakim perbicaraan telah memutuskan, atas dasar pernyataan beramaran tersebut di mana perayu telah mengakui bahawa beliau adalah seorang pengedar dadah dan bahawa dadah yang dijumpai itu adalah kepunyaan beliau, bahawa beliau bersalah atas kesalahan di dalam kes tersebut. Oleh itu, perayu telah disabitkan dengan sempurnanya atas dasar pengakuan beliau di dalam pernyataan beramaran tersebut yang mana telah dengan sempurnanya dimasukkan oleh hakim perbicaraan dan yang mana telah dipertimbangkan dengan sempurnanya memandangkan pembelaan beliau dan kesemua keterangan kes tersebut.

[Rayuan ditolak.]

Case(s) referred to:
Chow Kok Keong v. PP [1998] 2 CLJ 469 ***(refd)***
Din Yahya v. PP [1992] 1 CLJ 17; [1992] 1 CLJ (Rep) 100 ***(foll)***
Ibrahim v. R [1914] AC 599 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
Poon Heong v. PP [1949] 15 MLJ 114 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A(1)(b), 37(da), 39B(1)(a), (B)(2)

For the appellant - Karpal Singh (Gurbachan Singh); M/s Bachan & Kartar
For the respondent - Vong Poh Fah DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-20-91]

Reported by Suresh Nathan

JUDGMENT

KC Vohrah JCA:
The appellant was charged in the Shah Alam High Court that he together with another person had trafficked in 86.47 grams of heroin on 13 September 1990 at about 1.45am at house No. 1, Jalan Taman Melur, Ampang, Hulu Langat, Selangor, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39(B)(2) thereof.

At the close of the prosecution's case the High Court acquitted the appellant's female companion and called upon him to make his defence on the trafficking charge. The appellant elected to make his defence on oath. The court convicted him on the trafficking charge.

The High Court in convicting the appellant had principally relied on the cautioned statement made by the appellant to a Chief Inspector. That statement contained an admission that the police had examined his room and that in his wooden cupboard which he had kept locked the police found plastic packets of heroin. He admitted having previously sold several packets from the lot. He also admitted that a weighing machine was found in his cupboard.

The mainstay of the grounds supporting the appeal relates to the appellant's challenge to the admissibility of the cautioned statement and the reliance placed on it by the High Court. The appellant's next ground, relying on *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170, is that if the cautioned statement is ruled inadmissible by the Court of Appeal then the conviction cannot be sustained as the High Court had relied on the presumption of trafficking under s. 37(da) of the Act which relies on the possession of 15 grams or more of heroin for it to be invoked when the court could not have relied on the presumption of possession of the heroin under s. 37(d) on the basis the heroin was found in his room as there was no evidence **aliunde** to show that he had the possession of the heroin.

To understand the nature of the challenges made it would be necessary to narrate the relevant undisputed facts of the case.

Undisputed Facts

On 12 September 1990 at about 9.45pm a surveillance team of police personnel led by Inspector Hassan Jalaluddin (PW4) at Jalan Pandan 1, Ampang, saw a Chinese man, later identified as the 1st accused and now the appellant, approaching the area of the surveillance. PW4 and his team approached the appellant whereupon he ran away. He was then chased, apprehended and arrested. The appellant subsequently led PW4 and his team to a car. In the car was a Chinese woman, later identified as the 2nd accused, sitting in the front passenger seat. She was also arrested.

From the 2nd accused was seized a bunch of seven keys. Both the appellant and the 2nd accused were brought to the office of PW4 at the Head Office at Jalan Hang Tuah.

At about 1.45am on 13 September 1990 PW4 with his team, the appellant and the 2nd accused proceeded to a double storey link house at No. 1, Jalan 25, Taman Melur, Ampang, Hulu Langat, Selangor.

Using keys from the bunch of keys which had been seized PW4 unlocked the padlock securing the gate leading to the compound of the house and the other locks securing the front door and the grille thereat and they all entered the house.

PW4 then opened the door of the back room on the 1st floor with one of the keys from the bunch and entered the room.

Inside the room was a cupboard and using one of the keys from the bunch PW4 opened the cupboard. He found at the bottom of the cupboard three bags and a box. The three bags contained plastic packets wrapped in Chinese language newspaper bundles with some loose packets in one of the bags. Inside the box was a weighing machine. All the packets held a substance which on analysis by the Government Chemist (PW1) was found to contain 86.47 grams of heroin.

In the same room was found a bag in which were the International Passports of the appellant and the 2nd accused. Also found in the room were, *inter alia*, the lease agreement for the house naming the appellant as the tenant and rental receipts in his name.

On 15 September 1990 the appellant gave a statement to a recording officer, Chief Inspector Gian Kar Hoon, under s. 37A of the Act. This statement was challenged as being inadmissible but after a trial within a trial was ruled as an admissible cautioned statement.

Identity Of Drug

Mr. Gurbachan who appeared with Mr. Karpal Singh for the appellant argued that there were serious doubts as to the identity of the packets which were seized in the house where PW4 described the contents as powdery and the packets which were given to the Government Chemist for analysis the contents of which were described as granular and powdery. We shall deal with this issue first as if there is doubt as to the identity of the substance seized, then the conviction should be set aside. We have examined the notes of proceedings of the trial and are satisfied as the learned Judicial Commissioner (the trial judge) was that there is no break in the chain of evidence from the time the packets of the drug were seized up to the time they were sent to the Government Chemist for analysis. We are satisfied that the substance described as powdery by PW4 was the same substance which was examined by the Chemist although he described it, because of his training as a Chemist and Analyst, more accurately than PW4.

The Cautioned Statement

To understand the nature of Mr. Karpal Singh's challenge as to the admissibility of the cautioned statement it would be necessary to look at the evidence PW4 gave during the trial within the trial relating to what he did before recording the cautioned statement.

When the appellant was brought before the recording officer, the officer recorded the personal details of the appellant in an official police form and noted that he had examined the appellant and had not found any bruise, cut or scar on his person. Before administering the caution under s. 37A(1)(b) of the Act, the Chief Inspector also noted this:

> Bila ditanya jika ada apa-apa complain hendak dibuat kepada saya, dia jawab tiada, hanya mengatakan kawan perempuannya tidak terlibat apa-apa.
>
> (When asked if he had any complaint to make to him, he replied there was none except he wished to state that his girl friend is not involved at all.)

The Chief Inspector then recorded that he administered and explained to the appellant the caution under s. 37A(1)(b). He also recorded that he put a question to him and the answer given by the appellant thus:

> Soalan: Adakah kamu faham akan amaran yang dibacakan dan diterangkan kepada kamu dalam bahasa Hokkien seperti diatas?
>
> Jawap: Faham.
>
> (Question: Do you understand the caution that was read and explained to you in Hokkien as (stated) above?
>
> Answer: Yes)

Only then did the Chief Inspector proceed to record the cautioned statement from the appellant.

Mr. Karpal Singh in challenging the admissibility of the cautioned statement argued that the Chief Inspector Gian, the recording officer of the statement, had not explained to the appellant what the word "inducement" meant. And in connection with this learned counsel argued that the Chief Inspector should have questioned the appellant further when the appellant told him that his girl friend was not involved.

The second point Mr. Karpal Singh took on the inadmissibility of the cautioned statement was that the recording officer instead of telling the appellant that any statement "may" be used as evidence had told him that the statement "will be" used as evidence which is contrary to the terms of the provision under s. 37A(1).

Both points raised have reference to the proviso to s. 37A(1).

The proviso to s. 37A(1) reads:

> 37A.(1) Where any person is charged with any offence against this Act any statement ... made at any time ... shall be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination for the purpose of impeaching his credit.
>
> Provided that no such statement shall be admissible or used as aforesaid:
>
> (a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
>
> (b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect – 'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'.
>
> Provided ...

We will take the argument on the statutory caution first. The recording officer had cautioned the appellant thus:

> Adalah kewajipan saya memberi amaran kepada kamu bahawa kamu tidak diwajib berkata apa-apa atau menjawab apa-apa soalan, tetapi apa-apa yang kamu kata samada menjawab sesuatu soalan atau tidak akan diambil sebagai keterangan.
>
> (It is my duty to caution you that you are not obliged to say anything or answer any question but anything you say whether in answer to any question or not will be taken as evidence.)

Mr. Karpal Singh argued that caution administered was not complete and the proper form was not used and that while the statutory caution provided for "anything you say ... may be given in evidence" the recording officer had told the appellant that "anything you say ... will be taken as evidence."

It will be noted that the trial judge rejected the challenge. We agree that was rightly done. Of importance is whether there was any hint of compulsion in the caution administered on the appellant to give a statement. There was none. In fact it was clear the caution administered to him showed that he was not

required to make a statement but that if he did, it will be used in evidence. It is not necessary to use the prescribed words of the statutory caution; it would be sufficient if the words used are of like effect on the accused: *Din bin Yahya v. PP* [1992] 1 CLJ 17; [1992] 1 CLJ (Rep) 100. The recording officer here, had instead of using the exact words of the statutory caution, unwittingly provided him with a clearer option for him not to give the statement but the appellant opted to give the cautioned statement. There is no principle of justice that has been injured by the choice of words that the recording officer used when he administered the caution. We would like to note that in coming to our conclusion we also considered the Court of Appeal (FM) case of *Poon Heong v. PP* [1949] 15 MLJ 114.

We now come to the matter of the argument that the appellant was not properly explained as to what inducement means and that when the appellant stated that his girl friend was innocent the recording officer did not probe further why he made the statement. It will be noted that neither in the trial within the trial nor in the main trial was it ever remotely suggested by the appellant that he was promised by someone in authority if he made the cautioned statement the girl would be released or that she would not be prosecuted nor was it ever suggested by the appellant that he was in any way prevailed upon by someone in authority to make the cautioned statement.

The trial judge had made a finding that the recording officer had properly explained what the meaning of inducement is to the appellant – and it is a valid finding of fact with which we agree.

The defence did not identify the nature of the inducement nor the person who induced the appellant to make the statement. The legal burden is always on the prosecution to prove voluntariness beyond all reasonable doubt and it is not for the defence to prove involuntariness (see *Ibrahim v. R* [1914] AC 599) and that the prosecution does that by adducing positive evidence to prove that it was made voluntarily. The prosecution, however, will not be able to go beyond that on specific issues unless the defence challenges the admissibility on the ground that the caution was not properly administered with specific details as to what went amiss or challenges the voluntariness and admissibility of the statement on the basis that there was a threat, promise, inducement or oppression not in general and vague terms but in terms enough to identify the nature of the threat, promise, inducement or oppression and the person in authority who inspired it: to ask for something less would be to impose an unfair burden on the prosecution.

It has to be noted that when the appellant was called to make his defence (on the basis of his cautioned statement and also on the basis of evidence of presumptive possession of the heroin) his defence in regard to the cautioned statement was that he had fabricated the incriminating admissions therein as he wished to protect his girl friend and that the heroin was not his, that the room where the packets of heroin were found was not his, that the room belonged to a male friend which he had borrowed the use of and that the house was occupied by five or six persons.

The trial judge again reconsidered the cautioned statement and did not change his mind on the admissibility of the cautioned statement. He rejected the story of the appellant that he had fabricated the incriminating admissions therein. The trial judge held that on the basis of the cautioned statement where the appellant had admitted that he was a drug trafficker and that the drug found was his, he was guilty of the offence in the case. He added that the appellant did not raise any reasonable doubt on the prosecution's case.

As we had stated earlier we cannot see any reason to disagree with the ruling of the trial judge before he called upon the appellant to make his defence that the cautioned statement is admissible. And we have no reason to disagree with him when he sustained the admissibility of the cautioned statement after he reconsidered it in the light of the defence evidence and all the other evidence in the case.

As Mr. Karpal Singh had rightly conceded before us, this court has to decide whether the cautioned statement is admissible and everything else follows from that ruling. He had argued that if the cautioned statement is inadmissible then on the basis that there is evidence showing that the heroin was found in the room and assuming the room was his, while there is a presumption of possession of the heroin in him by virtue of s. 37(d) of the Act, there cannot from this presumption be another presumption that he was trafficking in the drug. We agree that this aspect of the law was clarified by the Federal Court in 1998 in the case of *Muhammed bin Hassan v. PP* (well after the conclusion of the trial of our case by the trial judge in 1995) where as Edgar Joseph Jr. FCJ in *Chow Kok Keong v. PP* [1998] 2 CLJ 469 succintly observed "in that case it was held that it is not permissible to pile the presumption of trafficking under s. 37(da) upon the presumption of possession under s. 37(d) of the Act."

What it means is that if the conviction of the appellant cannot be sustained on the basis of the cautioned statement, at best the appellant can only be convicted for possession of the heroin. But that is not the case here. The appellant was properly convicted on the basis of his admissions in the cautioned statement which had been properly admitted by the trial judge and

which had been properly considered in the light of his defence and all evidence of the case as we had observed. We can see no reason for interfering with his conviction on the charge of trafficking in the said heroin and the sentence passed on him. The appeal against conviction and sentence is dismissed.